

AN FTC GUIDE TO DEALINGS WITH COMPETITORS

SPOTLIGHT ON TRADE ASSOCIATIONS

MOST TRADE ASSOCIATION ACTIVITIES are procompetitive or competitively neutral. For example, a trade association may help establish industry standards that protect the public or allow components from different manufacturers to operate together. The association also may represent its members before legislatures or government agencies, providing valuable information to inform government decisions. When these activities are done with adequate safeguards, they need not pose an antitrust risk.

BUT FORMING A TRADE association does not shield joint activities from antitrust scrutiny: Dealings among competitors that violate the law would still violate the law even if they were done through a trade association. For instance, it is illegal to use a trade association to control or suggest prices of members. It is illegal to use information-sharing programs, or standardized contracts, operating hours, accounting, safety codes, or transportation methods, as a disguised means of fixing prices.

One area for concern is exchanging price or other sensitive business data among competitors, whether within a trade or professional association or other industry group. Any data exchange or statistical reporting that includes current prices, or information that identifies data from individual competitors, can raise antitrust concerns if it encourages more uniform prices than otherwise would exist. In general, information reporting cost or data other than price, and historical data rather than current or future data, is less likely to raise antitrust concerns. Dissemination of aggregated data managed by an independent third party also raises fewer concerns.

The FTC and DOJ have developed guidelines, known as the *Statements of Antitrust Enforcement Policy in Health Care*, for health care providers sharing price and cost data, and the principles in these guidelines are broadly applicable to other industries as well. The DOJ has also issued numerous business review letters relating to proposed information exchanges by various trade associations.

DEALINGS AMONG COMPETITORS THAT VIOLATE THE LAW WOULD STILL VIOLATE THE LAW EVEN IF THEY WERE DONE THROUGH A TRADE ASSOCIATION.



Q: IT IS MY JOB TO COLLECT INFORMATION ON COMPETITORS FROM PUBLIC SOURCES, SUCH AS TRADE JOURNALS, SECURITIES FILINGS, AND PRESS RELEASES. I CIRCULATE MY REPORT THROUGHOUT THE COMPANY. IS THIS A PROBLEM?

A: No. Your company may collect price or other competitive information from public sources.

Q: I AM A REGIONAL SALES MANAGER AND I REGULARLY GET CALLS FROM AN INDUSTRY CONSULTANT. IF I SHARE WITH HIM OUR COMPANY'S PLAN TO RAISE PRODUCT PRICES, DOES THIS CREATE A PROBLEM FOR MY COMPANY?

A: Information about future plans should be closely guarded; disclosing future plans outside the company could alter competitors' decisions and raise antitrust concerns. In addition, employees should be careful when sharing information they could not otherwise share with competitors through intermediaries such as a financial analyst or even a supplier. If the consultant were to share that specific information with the company's competitors, resulting in a change in their pricing strategy, such indirect communications could be seen as facilitating an agreement if other evidence points to a coordinated strategy.

Q: THE BYLAWS OF OUR TRADE ASSOCIATION REQUIRE MY COMPANY TO PROVIDE SALES DATA. WHAT SHOULD I DO?

A: Many trade associations maintain industry statistics and share the aggregated data with members. Collection of historical data by an independent third party, such as a trade association, that is then shared or reported on an aggregated basis is unlikely to raise competitive issues. Other factors can also reduce the antitrust risk. For instance, the *Statements of Antitrust Enforcement Policy in Health Care* set out a "safety zone" for data exchanges: (1) that are gathered and managed by a third party (like a trade association); (2) involve data more than three months old; and (3) involve at least five participants, when no individual participant accounts for more than 25% on a weighted basis of the statistic reported, and the data is aggregated such that it would not be possible to identify the data of any particular participant.

